

No. 07-1424

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2000,
Petitioner**

v.

**NATIONAL LABOR RELATIONS BOARD,
Respondent**

**ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

(A) Parties and Amici: Service Employees International Union, Local 2000, the petitioner herein, was the charging party in the case before the Board. The Board is the respondent herein, and the Board’s General Counsel was a party in the case before the Board.

(B) Ruling Under Review: This case involves a petition for review of the Board’s Decision and Order issued on June 25, 2007, and reported at 350 NLRB No. 9.

(C) Related Cases: This case has not previously been before this Court or any other court. Board counsel are unaware of any related cases pending before, or about to be presented before, this Court or any other court.

TABLE OF CONTENTS

Headings	Page
Statement of subject matter and appellate jurisdiction	1
Statement of the issue presented	3
Relevant statutory provisions.....	3
Statement of the case.....	3
Statement of facts	4
I. The Board’s findings of fact.....	4
A. Background	4
B. The Union plans a series of temporary, intermittent work stoppages	5
C. The Center issues warning letters to participating employees	6
II. The Board’s conclusions and order.....	7
Summary of argument.....	8
Standard of review	10
Argument.....	11
The Board reasonably concluded that the Union engaged in a strategy of intermittent work stoppages which rendered those stoppages unprotected and, therefore, that the Center did not violate the Act by issuing warning letters to participating employees	11
A. Intermittent work stoppages are not protected by the Act.....	11
B. The Board reasonably inferred that the Union had a strategy of engaging in intermittent weekend stoppages.....	13

TABLE OF CONTENTS

Headings-Cont'd	Page
C. The Union's remaining contentions lack merit.....	17
Conclusion	25

TABLE OF AUTHORITIES

Cases	Page(s)
<i>American Shipbuilding Co. v. NLRB</i> , 380 U.S. 300 (1965)	12
<i>Audubon Health Care Ctr.</i> , 268 NLRB 135 (1983)	24
* <i>C.G. Conn, Ltd. v. NLRB</i> , 108 F.2d 390 (7th Cir. 1939)	13,15,16
<i>Chelsea Homes, Inc.</i> , 298 NLRB 813 (1990), <i>enforced mem.</i> , 962 F.2d 2 (2d Cir. 1992)	15,19
<i>City Dodge Ctr., Inc.</i> , 289 NLRB 194 (1988), <i>enf'd sub nom.</i> , <i>Roseville Dodge, Inc. v. NLRB</i> , 882 F.2d 1355 (8th Cir. 1989)	19
<i>Columbia Portland Cement Co. v. NLRB</i> , 915 F.2d 253 (6th Cir. 1990)	12,13
* <i>Crenlo, Division of GF Bus. Equip., Inc.</i> , 215 NLRB 872 (1974), <i>rev'd on other grounds</i> , 529 F.2d 201 (8th Cir. 1975)	18,19,21
<i>Crenlo, Division of GF Bus. Equip., Inc. v. NLRB</i> , 529 F.2d 201 (8th Cir. 1975)	20
<i>Eagle International, Inc.</i> , 221 NLRB 1291 (1975)	19
* <i>Excavation-Construction, Inc. v. NLRB</i> , 660 F.2d 1015 (4th Cir. 1981)	12,18

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases--Cont'd	Page(s)
<i>Farley Candy Co.</i> , 300 NLRB 849 (1990)	19
<i>General Electric Co. v. NLRB</i> , 117 F.3d 627 (D.C. Cir. 1997).....	10
<i>Honolulu Rapid Transit Co., Ltd.</i> , 110 NLRB 1806 (1954)	22,23
<i>Hospital Episcopal San Lucas</i> , 319 NLRB 54 (1995)	19
<i>Hostar Marine Transp. Sys., Inc.</i> , 298 NLRB 188 (1990)	21
<i>John S. Swift Co., Inc.</i> , 124 NLRB 394 (1959), <i>enforced</i> , 277 F.2d 641 (7th Cir. 1960)	18
* <i>LCF, Inc. v. NLRB</i> , 129 F.3d 1276 (D.C. Cir. 1997).....	24
<i>Mastro Plastics Corp. v. NLRB</i> , 350 U.S. 270 (1956)	20
<i>Martel Construction, Inc.</i> , 302 NLRB 522 (1991)	21,22
<i>Molon Motor & Coil Corp.</i> , 302 NLRB 138 (1991), <i>enforced</i> , 965 F.2d 523 (7th Cir. 1992)	19

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases--Cont'd	Page(s)
* <i>NLRB v. Blades Manufacturing Corp.</i> , 344 F.2d 998 (8th Cir. 1965)	12
<i>NLRB v. Mike Yurosek & Son, Inc.</i> , 53 F.3d 261 (9th Cir. 1995)	12
* <i>NLRB v. Robertson Indus.</i> , 560 F.2d 396 (9th Cir. 1976)	11,16
<i>NLRB v. Washington Aluminum Co.</i> , 370 U.S. 9 (1962)	19
<i>Pac. Telephone & Telegraph Co.</i> , 107 NLRB 1547 (1954)	12
* <i>Polytech, Inc.</i> , 195 NLRB 695 (1992)	11,13,14,16,18,19
<i>Resort Nursing Home v. NLRB</i> , 389 F.3d 1262 (D.C. Cir. 2004)	10
* <i>Robertson Indus.</i> , 216 NLRB 361 (1975), <i>enforced</i> , 560 F.2d 396 (9th Cir. 1976)	18,19,20
<i>Roseville Dodge, Inc. v. NLRB</i> , 882 F.2d 1355 (8th Cir. 1989)	11,19
<i>Schneider Mills, Inc.</i> , 164 NLRB 879 (1967), <i>enforced per curiam</i> , 387 F.2d 954 (4th Cir. 1968)	19,20

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases--Cont'd	Page(s)
<i>Silver State Disposal Serv.</i> , 326 NLRB 84 (1998).....	24
<i>UFCW v. NLRB</i> , 506 F.3d 1078 (D.C. Cir. 2007).....	10
<i>Union Electric Co.</i> , 219 NLRB 1081 (1975).....	19,20
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	10

Statutes

National Labor Relations Act, as amended

(29 U.S.C. § 151 et seq.)

Section 7 (29 U.S.C. § 157)	12
Section 8(a)(1) (29 U.S.C. § 160(a)(1)).....	1,3,7,8,12
Section 8(a)(3) (29 U.S.C. § 160(a)(3)).....	1,3,7,8,12,23
Section 8(g) (29 U.S.C. § 158(g)).....	5
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	10
Section 10(f) (29 U.S.C. § 160(f))	2

Miscellaneous

The Developing Labor Law

(John E. Higgins, Jr., ed., 5th ed. 2006).....11,13,16,19

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Act	National Labor Relations Act
Board	National Labor Relations Board
Center	Swope Ridge Geriatric Center
Union	Service Employees International Union, Local 2000

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**BRIEF FOR
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Service Employees International Union, Local 2000 (“the Union”) to review an order of the National Labor Relations Board (“the Board”). In its Order, the Board dismissed a complaint against Swope Ridge Geriatric Center (“the Center”) that the Center had violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), by issuing warning notices to employees

who participated in repeated work stoppages. The Board found that because the work stoppages were unprotected, the Center did not violate the Act by issuing those notices.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court.

The Board's Decision and Order, issued on June 25, 2007, is reported at 350 NLRB No. 9.¹ That Order is final with respect to all parties under Section 10(f) of the Act. The Union's petition for review, filed on October 24, 2007, is timely; the Act places no limit on the time for filing actions to review Board orders.

¹ JA 1-6. In this final brief, "JA" references are to the deferred joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUE PRESENTED

Did the Board reasonably dismiss the complaint allegation that the Center violated Section 8(a)(3) and (1) of the Act by issuing warning notices to employees who participated in weekend work stoppages planned by the Union? The subsidiary issue is whether substantial evidence supports the Board's finding that the intermittent work stoppages were unprotected.

RELEVANT STATUTORY PROVISIONS

Applicable statutory provisions are set forth in an addendum to this brief.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a consolidated complaint in November 2006, alleging that the Center violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by issuing warning letters to employees who participated in intermittent work stoppages. (JA 1.) After a hearing, an administrative law judge dismissed the complaint in its entirety. (JA 6.) The judge found that the Union had engaged in a planned series of unprotected, intermittent work stoppages. Because the stoppages were unprotected, he found that the Center did not violate the Act by issuing warning letters to participating employees. (JA 5.)

The Board agreed with the administrative law judge that the Union had engaged in a strategy of intermittent work stoppages and that this conduct was

unprotected. (JA 1.) Accordingly, the Board, in agreement with the judge, dismissed the complaint against the Center. (JA 1.) The facts supporting the Board's order are summarized below; the Board's conclusions and order are described thereafter.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Center is a non-profit nursing home in Kansas City serving primarily Medicaid patients. (JA 1; JA 60.) The Union represents a bargaining unit of approximately 40 certified nursing assistants and certified medical technicians at the Center. (JA 2.)

The facility is open around the clock. Because employees do not like to work weekends, making weekend shifts difficult to staff, the Center requires all employees to work one shift every other weekend. (JA 3; JA 12, 15, 21, 58.) To ensure that employees share the burden of working weekends, they are required to make up missed weekend work unless they have a personal or family illness or other emergency. (JA 3; JA 12, 14, 16, 33-35.)

The Center issues written "no-call/no-show" letters to employees who fail to call in two hours prior to missing a shift. (JA 3; JA 57-58.) Under the Center's policy, three no-call/no-show letters lead to termination. (JA 3; JA 14.) No-

call/no-show letters stay in an employee's file for 18 months, after which the letters no longer count toward the three no-call/no-show termination rule. (JA 3; JA 14, 19.)

B. The Union Plans a Series of Temporary, Intermittent Work Stoppages

The Center and the Union have had a series of collective-bargaining agreements, the most recent of which expired on April 30, 2006. (JA 2; JA 13.) The parties negotiated for a new contract but were unable to reach agreement, disagreeing primarily over the Union's demand for a wage increase larger than that offered by the Center. (JA 2.)

As a result of the disagreement over a wage increase, the Union engaged in a series of weekend work stoppages. (JA 1 n.3; JA 79, 83, 84.) The Union chose weekend work stoppages because employees did not like working on weekends and so that employees could continue to earn most of their wages while avoiding undesirable weekend work. (JA 3-4; JA 12, 15, 18, 21, 58.)

To implement its strategy, the Union gave the Center a series of notices of its intent to engage in temporary weekend work stoppages; in accordance with Section 8(g) of the Act (29 U.S.C. § 158(g)), the Union provided the notices in writing at least 10 days before the planned stoppages. On July 14, 2006, the Union gave the Center its first notice that it intended to strike beginning Friday, August 4,

at 11 p.m. (JA 2; JA 78.) On August 2, the Union withdrew the 10-day strike notice, cancelling the August 4 strike at the employees' request because they felt they were not prepared. (JA 2; JA 43, 48, 80.)

The same day, the Union announced a second strike to begin on Saturday, August 26, at 2 p.m. (JA 2; JA 81.) On August 24, the Union informed the Center that the work stoppage would be limited to 24 hours, beginning at 2 p.m. on Saturday, August 26, and ending at 2 p.m. on Sunday, August 27. (JA 2; JA 82.) The Union held the August 26-27 work stoppage as scheduled. (JA 2.)

One day later, August 28, the Union sent another notice to the Center, this time giving notice for a third strike to begin on Saturday, September 16 at 2 p.m. (JA 2; JA 85.) On September 13, the Union again sent a clarification amendment, notifying the Center that this strike would also be a 24-hour work stoppage beginning at 2 p.m. on September 16 and ending at 2 p.m. on September 17. (JA 2; JA 86.) This temporary work stoppage also occurred as scheduled. (JA 2.)

C. The Center Issues Warning Letters to Participating Employees

Of the individuals rallying outside the Center during the work stoppages, only about seven were unit employees. (JA 3; JA 82, 86.) Several of these employees participated in both work stoppages. (JA 24, 26, 37, 46-49.)

Employees were well aware of the Center's call-in policy, which was contained in the employee handbook. (JA 3; 20, 27-28, 32, 40.) Prior to the

scheduled work stoppages, the Center held several meetings and reminded employees to call in if they intended to miss their shifts during the stoppages. (JA 3; 17, 22.) Only one of the participating employees called in as required by the Center's policy. (JA 52, 61.)

In accordance with its policy, the Center issued no-call/no-show letters to participating employees who did not call in prior to missing their scheduled shifts and required employees to make up missed weekend shifts. (JA 23, 51, 61.) No employee was terminated as a result of receiving a no-call/no-show letter. (JA 3 & n.5.) Under the Center's policy, such warning letters are removed from employees' personnel files after 18 months. (JA 14, 19.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Battista and Members Schaumber and Kirsanow) found, in agreement with the administrative law judge, that the Union's planned, intermittent work stoppages were not protected under the Act. Finding that the Center did not violate Section 8(a)(3) and (1) by issuing warning letters to employees who participated in the stoppages, the Board dismissed the complaint against the Center in its entirety.

SUMMARY OF ARGUMENT

The Board reasonably found that the Center did not violate Section 8(a)(3) and (1) of the Act by issuing warning letters to employees who participated in temporary intermittent weekend work stoppages because those stoppages were not protected under the Act. In making this finding, the Board reasonably inferred that the Union had a plan or strategy to engage in intermittent stoppages. The record shows that the Union adopted this tactic as a part of a strategy to pressure the Center to accept its bargaining demands for higher wages. But instead of engaging in a genuine economic strike, a strike in which the employees stop work altogether and accept the risks of financial loss, the Union here sought to create a “strike” in which employees temporarily stopped work at their own convenience.

The evidence of the Union’s strategy was plain: the Union planned three and implemented two weekend work stoppages in pursuit of its bargaining demands. The Union decided that those work stoppages would be limited to 24 hours. The Union chose to stop work only on intermittent weekends—shifts the Center had trouble filling and that employees did not like to work. The Board, relying on this evidence, reasonably concluded that the Union engaged in a strategy of intermittent work stoppages, rendering those work stoppages unprotected.

The Union argues that its weekend work stoppages were protected—and, therefore, that the employees should not have received no-call/no-show letters—for three reasons. First, the Union argues, contrary to established case law, that two work stoppages are always protected. The Union errs in contending that it was entitled to two free bites. The cases on which it relies are distinguishable because they do not involve a union strategy to engage in intermittent stoppages. In any event, even a single work stoppage will lose the protection of the Act if, like here, it is part of a plan or strategy to engage in intermittent work stoppages.

Next, the Union claims that no employee struck twice and, therefore, each employee's single work stoppage was protected. Contrary to this claim, whether individual employees participated more than once is irrelevant; what matters is that, as the Board found here, the Union had a plan to engage in intermittent work stoppages. In any event, most of the participating employees struck more than once.

Finally, the Union argues that the Board simply presumed that the Union had a strategy of stopping work intermittently. The Board's decision explicitly rejected any such presumption. Instead, the Board reasonably inferred, based on the evidence presented by the Center, that the Union had such a strategy; the Board also appropriately noted the Union's failure to rebut that evidence.

STANDARD OF REVIEW

This Court will “uphold the Board’s dismissal of an unfair labor practice charge unless its findings are unsupported by substantial evidence in the record considered as a whole, or unless the Board ‘acted arbitrarily or otherwise erred in applying established law to facts.’”² Under this deferential standard of review, this Court will reverse the Board’s findings of fact “only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.”³ Consistent with the standard of review set forth in Section 10(e) of the Act (29 U.S.C. § 160(e)), a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.”⁴

² *UFCW v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007) (quoting *General Elec. Co. v. NLRB*, 117 F.3d 627, 630 (D.C. Cir. 1997)).

³ *Id.* (quoting *Resort Nursing Home v. NLRB*, 389 F.3d 1262, 1270 (D.C. Cir. 2004)).

⁴ *Id.* (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

ARGUMENT

THE BOARD REASONABLY CONCLUDED THAT THE UNION ENGAGED IN A STRATEGY OF INTERMITTENT WORK STOPPAGES WHICH RENDERED THOSE STOPPAGES UNPROTECTED AND, THEREFORE, THAT THE CENTER DID NOT VIOLATE THE ACT BY ISSUING WARNING LETTERS TO PARTICIPATING EMPLOYEES

A. Intermittent Work Stoppages Are Not Protected by the Act

Although the right of employees to engage in a total economic strike is undisputed, intermittent strikes are “unprotected because they produce a situation that is ‘neither strike nor work.’”⁵ An intermittent strike “is a series of concerted refusals to work during a short interval, followed by a resumption of work.”⁶ As the Board has explained, intermittent strikes are unprotected if undertaken as “part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.”⁷ The Act does not protect intermittent work stoppages because they effectively allow employees to unilaterally determine their own terms

⁵ *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355, 1359 (8th Cir. 1989) (quoting *NLRB v. Robertson Indus.*, 560 F.2d 396, 298 (9th Cir. 1976)).

⁶ 1 *The Developing Labor Law* 243 (John E. Higgins, Jr., ed., 5th ed. 2006).

⁷ *Polytech, Inc.*, 195 NLRB 695, 696 (1992).

and conditions of employment.⁸ Nothing in the Act implies “that the right to strike ‘carries with it’ the right exclusively to determine the timing and duration of all work stoppages. The right to strike as commonly understood is the right to cease work, nothing more.”⁹

Section 7 of the Act (29 U.S.C. § 157) protects the right of employees to engage in concerted activities, including full strikes. Therefore, an employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) if it disciplines employees for participating in concerted union activity protected by Section 7. However, where employees engage in unprotected, intermittent work stoppages, an employer does not violate the Act by disciplining those employees.¹⁰

The Board reasonably concluded that the Union’s planned weekend work stoppages were part of a strategy of engaging in intermittent stoppages to suit the employees’ convenience and pressure the Center to accept its bargaining demands, without requiring employees to make the sacrifices that a genuine strike would have entailed. As we show below, based on its finding that the stoppages were

⁸ See *Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 259 (6th Cir. 1990); *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 266 & n.2 (9th Cir. 1995).

⁹ *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 310 (1965).

¹⁰ See *Excavation-Constr., Inc. v. NLRB*, 660 F.2d 1015, 1020 (4th Cir. 1981). *Accord NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1004-05 (8th Cir. 1965); *Pac. Tel. & Tel. Co.*, 107 NLRB 1547, 1549-50 (1954).

unprotected, the Board reasonably concluded that the Center did not violate the Act by issuing warning letters to participating employees and, therefore, dismissed the complaint.

B. The Board Reasonably Inferred that the Union Had a Strategy of Engaging in Intermittent Weekend Stoppages

Not all short work stoppages are unprotected.¹¹ But the law is clear: there can be no “strike on the installment plan.”¹² When a “stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them,” that work stoppage loses the protection of the Act.¹³ The Board here examined the totality of the evidence and reasonably determined that the Union’s intermittent weekend work stoppages were part of a plan to engage in a series of temporary measures in furtherance of its bargaining strategy. (JA 1 n.3.)

The Board reasonably inferred that the Union had such a strategy based on evidence that is largely undisputed. The Union issued three strike notices to the Center and engaged in two weekend work stoppages. (JA 78, 80-81, 85.) In

¹¹ See *Columbia Portland Cement*, 915 F.2d at 259.

¹² *C.G. Conn, Ltd. v. NLRB*, 108 F.2d 390, 397 (7th Cir. 1939).

¹³ *Polytech*, 195 NLRB at 696. See also 2 *The Developing Labor Law*, *supra*, at 1611 & n.160.

follow-up letters prior to both work stoppages, the Union informed the Center that its strikes would be limited to 24 hours, taking place from 2 p.m. Saturday until 2 p.m. Sunday. (JA 82, 86.) The Union also told employees at a pre-strike meeting that the strikes would be limited to 24 hours. (JA 41.)

Indeed, the Union (Br. 26) acknowledges that its strategy was to undertake temporary, intermittent job actions. It specifically admits (Br. 26) that it selected weekends because it “did not want to call a strike that continued indefinitely. Rather, the Union wanted to call only a one-day strike.” Moreover, as the Union further admitted (Br. 26), it scheduled the work stoppages only on weekends because “employees did not like working on weekends,” and they were hard to staff. (JA 3-4; JA 12, 18, 58.) By planning the work stoppages in this way, choosing only weekends and switching weekends so that employees could share the burden (JA 39), the Union was “plainly unwilling [for employees] to assume the status of strikers—a status contemplating a risk of replacement and a loss of pay.”¹⁴

The Union errs (Br. 10) in relying on the fact that it withdrew its notice of the first planned work stoppage. Far from showing, as the Union would have it, that there were only two isolated strikes here, the fact that the Union planned a

¹⁴ *Polytech*, 195 NLRB at 696.

third stoppage in support of its bargaining demands actually supports the Board's inference that the Union's overall bargaining strategy included engaging in intermittent weekend stoppages. After all, it is undisputed (Br. 10) that the Union withdrew its first notice specifically in order to give employees more time to prepare. In so stating, the Union effectively revealed that it had a plan and, therefore, that this was far from the sort of spontaneous employee walkout over grievances that the Act protects.¹⁵ Moreover, the Union's failure to carry out a third stoppage does not undermine the Board's reasonable inference that the Union had such a plan.

As the Seventh Circuit has explained, the term "strike" commonly refers to "stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been granted."¹⁶ Nothing about the Union's planned weekend work stoppages resembled that definition of a strike. The stoppages were time-limited, the Union did not refuse to resume work until its bargaining demands were met, and the Union made no unconditional offer to return to work at the conclusion of the "strike." Rather, the Union attempted to "be

¹⁵ See, e.g., *Chelsea Homes, Inc.*, 298 NLRB 813, 831 (1990), *enforced mem.*, 962 F.2d 2 (2d Cir. 1992).

¹⁶ *C.G. Conn.*, 108 F.2d at 397.

on a strike and at work simultaneously;” accordingly, the stoppages were unprotected.¹⁷

When the Center refused to grant the desired wage increase during bargaining, the Union and its members had two choices: “First, they could continue work, and negotiate further with the [employer], or, second, they could strike in protest.”¹⁸ But the employees here “did neither, or perhaps it would be more accurate to say they attempted to do both at the same time.”¹⁹ Such work stoppages are unprotected because “no law or logic [] gives the employee the right to work upon terms prescribed solely by him.”²⁰ Thus, on the basis of all the evidence, the Board reasonably concluded that the Union’s weekend work stoppages were unprotected because they were part of a plan or pattern of intermittent action “inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.”²¹

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* *Accord NLRB v. Robertson Indus.*, 560 F.2d 396, 398 (9th Cir. 1976).

²¹ *Polytech*, 195 NLRB at 696. *See also* 2 *The Developing Labor Law*, *supra*, at 1611 & n.160.

C. The Union's Remaining Contentions Lack Merit

The Union makes three primary arguments in favor of its claim that it did not engage in a strategy of intermittent strikes. First, the Union argues (Br. 9) that it only carried out two short work stoppages, and, therefore, that they were protected. But whether work stoppages are unprotected depends, not on the number of stoppages, but on the existence of a plan of intermittent job actions. Second, the Union claims that no employee struck twice and, therefore, that their individual actions were protected. This argument is not only factually incorrect, it ignores the Union's involvement in planning and carrying out weekend stoppages designed precisely to allow employees to participate while missing only one work shift (rather than two). Third, the Union incorrectly argues that the Board merely presumed that the Union had a plan to engage in intermittent action. The Board, however, based its conclusion on the evidence provided by the Center, which the Union failed to rebut. Each of the Union's arguments is discussed in turn below.

First, the Union's claim (Br. 9) that the "Board has held that two, short strikes do not constitute a planned series of intermittent strikes," is a misreading of the case law. Contrary to the Union's claim (Br. 13), there is no "magic number"

of work stoppages allowed before they become unprotected.²² As the Board explained in *Polytech, Inc.*, although a single concerted refusal to work is presumptively protected, where that single refusal affirms the employees' "intention to embark on an intermittent or recurring strike as a bargaining tactic," it loses the protection of the Act.²³ Thus, even one work stoppage can lose the protection of the Act if shown to be part of a strategy to engage in partial or intermittent strikes.²⁴ In any event, as shown above at pp. 5-6, in this case the Union planned three and carried out two intermittent stoppages as part of its bargaining strategy.

Simply put, the Union errs in contending that it was entitled to "two free bites." The cases that it cites (Br. 14-21) are distinguishable because they did not involve a plan or strategy to engage in partial or intermittent strikes. Nor do they stand for the proposition that two or fewer work stoppages are always protected. Rather, in the cited cases, the Board found the stoppages were not part of a union

²² *Robertson Indus.*, 216 NLRB 361, 362 (1975), *enforced*, 560 F.2d 396 (9th Cir. 1976); *Crenlo, Div. of GF Bus. Equip., Inc.*, 215 NLRB 872, 879 (1974), *rev'd on other grounds*, 529 F.2d 201 (8th Cir. 1975).

²³ *Polytech*, 195 NLRB at 696 (discussing *John S. Swift Co., Inc.*, 124 NLRB 394, 396 (1959), *enforced*, 277 F.2d 641 (7th Cir. 1960)).

²⁴ *See Excavation-Constr., Inc. v. NLRB*, 660 F.2d 1015, 1020 (4th Cir. 1981). *Accord John S. Swift Co., Inc.*, 124 NLRB 394, 396 (1959), *enforced*, 277 F.2d 641 (7th Cir. 1960)).

plan and were therefore protected. In those cases, different employees spontaneously stopped work over different issues,²⁵ they spontaneously walked off the job in direct response to their employers' actions,²⁶ or they stopped work in response to their employers' unfair labor practices.²⁷ Moreover, in many of the cases cited by the Union, the employees were unrepresented and did "not have the benefit of structured procedures to protest undesirable and fatiguing working conditions."²⁸ The presence of a union is a "major factor" tending to show that the intermittent stoppages are part of a plan or pattern toward a common goal, rather than spontaneous, isolated responses to distinct grievances.²⁹

²⁵ See *Chelsea Homes, Inc.*, 298 NLRB 813, 831 (1990), *enforced mem.*, 962 F.2d 2 (2d Cir. 1992); *Robertson Indus.*, 216 NLRB at 362; *Eagle Int'l, Inc.*, 221 NLRB 1291, 1296-97 (1975).

²⁶ See *Molon Motor & Coil Corp.*, 302 NLRB 138, 142 (1991), *enforced*, 965 F.2d 523 (7th Cir. 1992); *Farley Candy Co.*, 300 NLRB 849, 849 (1990); *City Dodge Ctr., Inc.*, 289 NLRB 194, 194 n.2 (1988), *enf'd sub nom.*, *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989); *Crenlo, Div. of GF Bus. Equip., Inc.*, 215 NLRB 872, 879 (1974), *rev'd on other grounds*, 529 F.2d 201 (8th Cir. 1975); *Union Elec. Co.*, 219 NLRB 1081, 1082 (1975).

²⁷ See *Hosp. Episcopal San Lucas*, 319 NLRB 54, 60 (1995); *Schneider Mills, Inc.*, 164 NLRB 879, 884 n.17 (1967), *enforced per curiam*, 387 F.2d 954 (4th Cir. 1968).

²⁸ *Polytech*, 195 NLRB at 696.

²⁹ 2 *The Developing Labor Law*, *supra*, at 1612 (citation omitted). See also *NLRB v. Washington Aluminum Co.* 370 U.S. 9, 14 (1962) (employees with "no representative of any kind" had "to speak for themselves as best they could");

Contrary to the Union's suggestion, the Board relies not on simple numbers, but instead analyzes the circumstances of each case. For example, in *Robertson Industries*, unlike the instant case, the Board found no plan or pattern because employees engaged in two spontaneous, brief work stoppages—both involving different issues and different groups of employees.³⁰ Similarly, in *Union Electric*, the Board found that the employees' work stoppages were not part of a plan or pattern because each individual stoppage was “undertaken to protest a separate act of the employer.”³¹ And in *Schneider Mills*, the conduct was protected because the employees stopped work in response to the employer's repeated unfair labor practices.³² As the Board explained in that case, finding such work stoppages to be unprotected would “penalize[] one party . . . for conduct induced solely by the unlawful conduct of the other, thus giving advantage to the wrongdoer.”³³

Crenlo, Div. of GF Bus. Equip., Inc. v. NLRB, 529 F.2d 201, 204 (8th Cir. 1975) (unorganized employees “banded themselves together in a legitimate effort to present their grievances about wages to management”).

³⁰ *Robertson Indus.*, 216 NLRB at 362.

³¹ *Union Elec.*, 219 NLRB at 1082.

³² *Schneider Mills*, 164 NLRB at 884 n.17.

³³ *Id.* (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 287 (1956)).

Next, the Union claims (Br. 20) that because “no single employee in this case struck more than once,” the intermittent work stoppages are protected. The Union also claims (Br. 21) that even if a strike is intermittent, employees who participate only once are protected. But the question is whether *the Union* had a plan or strategy of engaging in intermittent stoppages—not whether individual employees missed more than one shift of work—and the Board reasonably inferred that it did. Further, there is no evidence that the six or seven employees who participated only took part in one work stoppage: the four employees who testified on the subject at the hearing (Gillespie, Neal, Redmon, and Allen) all stated that they participated in both events. (JA 24, 26, 37, 46-49.)

Nor do the cases cited by the Union stand for the proposition that an employer “could not lawfully discipline the employees who participated in only the first strike” (Br. 21). In *Hostar Marine* and *Crenlo*, the Board found that the discipline was unlawful because the employees had no plan of intermittent action.³⁴ And in *Martel Constr.*, the Board found that the employer unlawfully discharged two employees for refusing to cross a picket line on the first two consecutive days of a strike.³⁵ Although the union did subsequently engage in

³⁴ *Hostar Marine Transp. Sys., Inc.*, 298 NLRB 188, 194 (1990); *Crenlo*, 215 NLRB at 879.

³⁵ *Martel Constr., Inc.*, 302 NLRB 522, 529 (1991).

intermittent striking, the two employees had already been discharged for their protected union activity, not because the subsequent strike was intermittent.³⁶

The Union also does not help itself by claiming (Br. 7) that it called two weekend stoppages, not as part of a plan to engage in intermittent strikes, but simply to give each employee an opportunity to participate. This claim is beside the point. The Union was not required to strike on weekends; the uncontroverted testimony shows that weekends were chosen because employees did not like weekend work. Indeed, the Union admits (Br. 10) that fact. Thus, the choice of weekends was to suit the employees' convenience and permit them to retain most of the benefits of employment while temporarily relieving them of the burden of weekend work. (JA 39.)

In other words, the Union chose intermittent dates—the Union planned a strategy—that “arrogat[ed] . . . the [employer’s] right to determine their schedules and hours of work,” thereby forcing the Center to alter its schedule “to the changing whim which may suit the employees’ or a union’s purpose.”³⁷ By “in effect establish[ing] and impos[ing] upon the employer their own chosen

³⁶ *Id.*

³⁷ *Honolulu Rapid Transit Co., Ltd.*, 110 NLRB 1806, 1809 (1954).

conditions of employment,” the Union rendered the intermittent stoppages unprotected.³⁸

Finally, the Union errs (Br. 10-11) in asserting that the Board based its finding that the Union engaged in a strategy of intermittent strikes “on a presumption that the Board itself expressly rejected,” *i.e.*, “on the Union’s failure to come forward with an alternative explanation for giving three notices of its intention to call a strike and actually calling two strikes.” Contrary to the Union’s claim, the Board did not rely on any such presumption; rather, the Board reasonably inferred—based on the evidence presented by the Center in its defense against the unfair labor practice complaint—that the record showed such a plan. (JA 1 n.3.) Furthermore, the Board was fully warranted in noting the Union’s failure to come forward with any evidence in rebuttal. (JA 1 n.3.)

Contrary to the Union’s suggestion, the Board is not limited to direct evidence, or to the sort of “red-handed” admission of union intent present in *Honolulu Transit*.³⁹ Rather, as in cases concerning an employer’s motive under Section 8(a)(3) of the Act, because direct evidence of intent is seldom available,

³⁸ *Id.* at 1810.

³⁹ *See id.*

the Board may rely on circumstantial evidence.⁴⁰ Relying on evidence provided by the Center, which the Union failed to rebut, the Board reasonably found (JA 1 n.3) that the Center met its burden of showing the Union's work stoppages were unprotected.⁴¹

In sum, when employees engage in a plan or strategy of intermittent work stoppages, those stoppages are not protected by the Act. The evidence showed that the Union had such a plan: it limited the stoppages to 24 hours, chose weekends because employees did not like working weekends, and called off the first stoppage to give employees more time to prepare. Nothing about these three planned work stoppages was spontaneous, isolated, or in response to an unfair action by the Center. For a strike to receive the protection of the Act, it "must be complete, that is, the employees must withhold all their services from their employer. They cannot pick and choose the work they will do or when they will do it."⁴² On this record, the Board could reasonably find that the Union's work stoppages were unprotected, and therefore that the Center did not violate the Act by issuing warning letters to participating employees.

⁴⁰ See *LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997).

⁴¹ See *Silver State Disposal Serv.*, 326 NLRB 84, 85 (1998).

⁴² *Audubon Health Care Ctr.*, 268 NLRB 135, 137 (1983).

CONCLUSION

For the reasons stated above, the Board respectfully requests that this Court enter a judgment denying the Union's petition for review.

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ADDENDUM

STATUTES AND REGULATIONS

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization....

Section 8(g) of the Act (29 U.S.C. 158(g)) provides in relevant part:

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention.... The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Section 10 of the Act (29 U.S.C. 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) The Board shall have power to petition . . . for the enforcement of such order No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

UNITED STATES COURT OF APPEALS
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UNION, LOCAL 2000)	
)	
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)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent)	17-CA-23664

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 5,286 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 1st day of August 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the addresses listed below:

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